

Idaho Real Estate Commission's

# 2005 Continuing Education Core Course

Student Course Outline  
for the 4-hour course

Effective July 1, 2005  
To June 30, 2006

Developed by the  
Idaho Real Estate Education Council and  
Gail Heist, Donna Jones, Doug Marifice,  
Justin May, and Dr. Vincent Kituku

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## ATTENDANCE POLICY

Regular Attendance means 100% attendance at all sessions of a pre-license or continuing education (CE) course.

Make-Up Work for Pre-license Courses: If a student misses a portion of a class, make-up work is allowed **only at the discretion of the instructor** to satisfy the attendance requirement. A student may complete make-up work if he/she misses no more than 20% of the scheduled in-class instruction time. A student who misses more than 20% of the course should be dropped from the class. All make-up work must be completed within 30 days of the last day of the course, and the student is not eligible to take the final course exam until all makeup is completed. Makeup work may consist of attendance in the corresponding class sessions in a subsequent offering of the same course, the supervised presentation by audio or video recording of the class sessions missed, or any other assignment deemed appropriate by the instructor.

Make-Up Work for CE Courses: Make-up work is not allowed, except for attendance in the corresponding class session in a subsequent offering of the same course, and **only at the discretion of the instructor**. Consequently, CE providers are compelled to impose stringent attendance standards, and may not award CE credit to a student who missed any portion (even a matter of minutes) of a CE class, unless the student successfully completes the required hours in a subsequent course offering, or completes the challenge CE exam if available. CE providers are charged with the responsibility of enforcing the attendance standard, and have developed various procedures for handling this issue. The Commission obligates providers to take a strict approach.

REQUIRED NOTICE: Providers and instructors of pre-license and continuing education courses approved in Idaho are required to include this "Attendance Policy" in each approved student course outline for all pre-license and continuing education courses.

See 54-2004(38), 54-2023(5), 54-2036(2)(g), Idaho Code.

Revised 10/03.

# PREFACE

## COURSE OBJECTIVES

This program is designed by the Idaho Real Estate Commission to provide real estate licensees with a review and an update of selected laws and professional subjects that affect real estate practitioners in Idaho. The course material is not designed to develop technical expertise, but is designed to familiarize licensees with new and changing laws and to review certain selected topics affecting the practice of real estate. The Commission believes that the content in this course will benefit the public interest by providing updated real estate information to real estate practitioners. **It is highly recommended that you complete the Core Course each year.**

While a great deal of care has been taken to provide detailed written reference materials to accompany this program, this material is by no means complete and should not be used as a substitute for competent legal or other professional advice. Personal opinions expressed by the instructors in this course are not necessarily the opinions of the Idaho Real Estate Commission or Education Council. Because the Idaho Real Estate Commission does not design, revise, sell, or approve forms for real estate transactions, any actual forms used herein are as samples only, and used with permission of copyright owners. They are not intended to be an endorsement of any particular form. If the instructor wishes, he/she may provide information concerning the examples used in the case study on the forms generally in use in his/her area of the state.

## CREDIT

To receive credit for this course by distance learning methods (video, audio, etc.) you MUST pass the challenge exam for this Core Course on or before June 30, 2006. If you fail the exam, you may retake it once. If you fail the retake exam, you will only receive credit by attending a live classroom presentation. This course, exam and retake exams will not be offered after June 30, 2006.

**It is highly recommended that  
you complete the Core  
Course each year!**

# REAL ESTATE HOT TOPICS



Douglas Marfice is a partner in the law firm of Ramsden & Lyons in Coeur d' Alene, Idaho. Doug practices principally in the areas of real estate litigation in North Idaho and Eastern Washington. Doug's practice emphasizes errors and omissions defense of brokers and agents as well as defense of property owners in eminent domain proceedings.

The following are several "hot topics" in the law that touch and concern the real state professional. The comments herein represent only a brief outline and explanation of the issues and are not intended to be a comprehensive evaluation of the applicable law nor a substitute of competent legal advice. These "hot topics" are intended to be a "heads-up" on issues, problems and trends that are developing or continuing.

## 1. Sex Offender Registry

In these troubled times, common sense dictates that before committing to what is likely the largest investment of one's lifetime (a home), buyers should try to ascertain whether the home's neighborhood is safe. Some physical signs (bars on windows, security gates, barbed wire, pit bulls, etc.) might give some indication as to the area's property crime rate. However, a more insidious and less obvious criminal element may exist even in the nicest of neighborhoods: the registered sex offender. Fortunately, it is not only possible, but in fact quite easy, to determine if any *known* sex offenders reside in the area.

Online Registry: [www.isp.state.id.us/identification/sex\\_offender/](http://www.isp.state.id.us/identification/sex_offender/)

- a. Allows you to search by name, date of birth, zip code, or county.
- b. Will give you the name, date of birth, residence address of an offender, offense convicted of, date and place of conviction.
  - (i) Also provides a picture of the individual;
  - (ii) Also provides a list of persons who are 30 days out of compliance.
- c. Registry information is "public record" and can be released, disseminated and shared.
  - (i) Exemption from liability: "Every person or governmental entity, who, acting without malice or criminal intent, obtains or disseminates information under this chapter shall be immune from civil liability for any damages claimed as a result of such disclosures . . ."  
*Idaho Code § 18-8325(3).*
  - (ii) Note: It is illegal to use registry information to harass or harm the offender.

## 2. Insurance Problems for Property Owners

As the property/casualty insurance industry evolves into a more selective one, property owners bear the brunt of this evolution, often in the form of higher premiums and less availability of insurance. Several types of insurance problems continue to vex property owners and purchasers in Idaho.

- a. Lack of fire protection (Fire Department/Fire Protection District) often means insurers are unwilling to cover the property.
  - (i) Not all property is serviced by an established or volunteer fire department.
  - (ii) International Fire Code (IFC) is State law in Idaho. However, IFC does not require much in the way of fire apparatus access for rural properties.
  - (iii) Insurance underwriting criteria changes periodically with actuarial data on risk of loss. *e.g.*, In drought years, higher fire risk means higher risk of loss which means higher premiums and/or less availability of insurance.
- b. Past Claims/CLUE Report
  - (i) Insurance underwriters eschew policy holders with a history of significant claims, particularly theft losses and water/mold related claims.
  - (ii) The Comprehensive Loss Underwriting Evaluation Report catalogues and considers past claims (type, number, size) history to determine insurability.
  - (iii) Buyer's credit score also considered by most underwriters. (Visit [www.choicetrust.com](http://www.choicetrust.com).)
- c. Title company refusal to close without binder.
  - (i) Title company is often a "dual agent" in the traditional sense of the term. It "represents" the interests of the parties (buyer/seller) and the lender.
  - (ii) Lenders delegate to title company (through escrow instructions) the responsibility to make sure there is a valid insurance binder in effect before the loan will fund.
  - (iii) If binder is not acquired, lender assumes risk of loss until insurance is in place. Lender reallocates risk to title company.

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### NOTES

### 3. Multiple Offers

For better or worse, many parts of Idaho are presently experiencing unprecedented sales activity. In some places the number of buyers far exceeds the listing inventory available. The law of supply and demand sometimes become the law of the jungle when multiple buyers compete for a property, sometimes using multiple agents, writing multiple offers before the property even gets into the multiple listing service. The result: multiple problems!

- a. Know who you represent!
  - (i) Limited dual agency is not designed for agents to represent multiple buyers who are interested in the same properties.
  - (ii) Listing price does not necessarily matter. As a seller's agent, you cannot "force" a sale (but you are probably entitled to your brokerage fee if the seller rejects a full price offer).
- b. Know that a deal isn't a deal until everyone has "signed off."
  - (i) Contract = offer + acceptance + mutual assent + consideration.
  - (ii) Once the documents are "signed around," presumption is that a binding contract exists. (Note: Most sellers only want a binding contract with one buyer at a time.)
- c. Idaho Association of REALTORS® "RE-32 Multiple Counter Offer" See *Appendix*.
  - (i) Well intentioned effort at a "standard" form for multiple offer situations. Title of form is, however, potentially misleading; not really a "counter-offer" in the true sense of the term. Instead, puts Buyer on notice that Seller will be making more than one counter-offer and specifies that, even after Buyer accepts the terms of Seller's counter-offer, Seller's "Final Acceptance" (another final signature by Seller ) is required to form a binding agreement.
  - (ii) Specifies that either party (Buyer or Seller) may withdraw from the transaction at any time prior to "Final Acceptance."
  - (iii) Important to read and understand the terms and effect of this document to avoid problem of multiple buyers erroneously believing they are "in contract."

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### NOTES

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#### 4. Lead Paint/Radon: Effect on FHA Financing

The FHA loan guarantee program continues to be a major player in the residential lending field for new or first time home buyers. Since these buyers often tend to gravitate to older, pre-owned properties, agents should be aware of conditions that may jeopardize the buyer's ability to secure a FHA loan.

- a. Federal Housing Administration (FHA) is a division of the U.S. Department of Housing and Urban Development (HUD). It adheres to strict lending protocols established by HUD for loans insured by FHA. (Note: FHA does not make loans; it insures them.)
  - (i) FHA loans allow for purchase with low or no closing costs and as little as 3% down payment, therefore lenders are cognizant of the potential for property defects being the cause of buyer default. (A buyer with little equity has little incentive to stick with a property that is found to have hazardous conditions.)
  - (ii) Currently HUD does not require radon testing for homes being insured under FHA mortgage insurance programs.
  - (iii) HUD does require appraiser review for "defective paint surfaces on all interior/exterior surfaces in homes built before 1/1/1978." See, *HUD Handbook 4150.2 § -6A.17* and notation of high-voltage transmission lines/tower or microwave relay dish/tower in proximity of property. See, *HUD Appraisal and Property Requirements*, p. 1-18f.
- b. If property is known to have tested positive for radon or lead-based paint hazards (for example, from testing previously done by seller), those conditions must be disclosed by seller. (Statutory duty under state and federal law.)
  - (i) Buyer (borrower) may have contractual duty to advise lender as well.
  - (ii) Known circumstances may impair conventional loan availability also.

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#### NOTES



## 5. Stigmatized Property

All competent real estate agents know that sellers must disclose physical defects in their property. But what about intangible “defects” and conditions that are not obvious (like a leaking roof or sagging foundation) but can adversely impact the value or desirability of the property by “stigmatizing” it?

- a. Idaho Code § [55-2801] 55-2701 to [55-2803] 55-2703 calls these: “psychologically impacted property.” *See Appendix for full text of statute.*
  - (i) § [55-2801] 55-2701 defines what a “psychologically impacted” property is.
  - (ii) § [55-2802] 55-2702 provides that there is no cause of action against an owner (or the agent who represents an owner) who fails to disclose that a property may be “psychologically impacted.”
  - (iii) § [55-2803] 55-2703 provides that if a purchaser requests in writing to know whether the property is “psychologically impacted,” the owner’s representative (agent) shall inquire of the owner.
    - 1. Information may be disclosed to purchaser with the consent of the owner, if consistent with privacy laws.
    - 2. If the owner refuses disclosure, the owner’s representative must simply notify the purchaser’s representative that the information will not be disclosed. No further obligation on part of owner.
- b. “Stigmatization” can also occur due to past physical conditions, now remedied or removed.
  - (i) Former clandestine drug labs.
  - (ii) Mold remediated properties.

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### NOTES

## 6. Property Disclosure 3-Day Waiver

Idaho's Property Condition Disclosure Act allows, in some (very limited) circumstances, buyers to rescind a purchase agreement based upon the condition of the property. This right to rescind worries sellers (often needlessly) so they (sellers) often attempt to have buyers waive the right to rescind. Questions have arisen as to whether that right of rescission may properly be waived.

- a. Any person intending to transfer residential real property (sale or lease) must complete a property condition disclosure form unless "exempt." *Idaho Code § 55-2502. See Appendix for full text of statute.*
  - (i) There are 16 exemptions listed in §55-2505.
- b. Specific information to be disclosed (and a suggested disclosure form) are in §§ 55-2506, 2507 and 2508.
- c. Transferor (seller) is not liable for errors, inaccuracies, or omissions not within the transferor's personal knowledge. *Idaho Code §55-2511.*
- d. Transferor is required to amend prior to closing if transferor discovers any of the information has changed. *Idaho Code § 55-2513.*
- e. Transferee (buyer) has the right to rescind upon receipt of information in disclosure form only if it is not timely provided by the seller. *Idaho Code § 55-2515.*
  - (i) Must state specifically what is objected to;
  - (ii) Must be delivered to transferor or agent within 3 days of actual receipt of disclosure form;
  - (iii) If not delivered within 3 days, transferee has **automatically waived** the right to rescind.
  - (iv) If form was timely provided (i.e., before contract entered), there is no right to rescind, therefore nothing to waive.
- f. Any person who willfully or negligently violates or fails to perform any duties described in the chapter is liable for actual damages. *Idaho Code § 55-2517.*
  - (i) Attempted liability waiver for non-compliance with the statute is probably unenforceable and/or void – violative of public policy.

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## NOTES

## 7. Purchase And Sale Agreement – Seller Confirmation

Many real estate purchase and sale agreement forms now contain an “extra” signature or initial line for sellers to confirm or acknowledge (once-and-for-all) their final, conclusive acceptance of the purchase offer including counteroffers, addenda, etc. Is this overkill and busy-work for agents, or an integral and necessary part of the purchase and sale agreement?

- a. Timing is Everything. Seller’s confirmation (signature, date, time) evidences receipt of the offer and seller’s response to it.
  - (i) Until seller has accepted buyer’s terms and conditions, without reservation or qualification, there is no clear *mutual assent*.
  - (ii) Absent *mutual assent*, there is no contract.
- b. Can mutual assent occur when one party does not know it has occurred?
  - (i) Under some circumstances – Yes!
  - (ii) Seller confirmation/acknowledgment is best evidence of mutual assent. Not necessarily required, but very important.
- c. Blank spaces in pre-printed forms that are left blank open the door to arguments of validity, ambiguity and enforceability.

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### NOTES

**8. Property Condition Disclosure Revisited: Termites, Powder Post Beetles, Carpenter Ants and Miscellaneous Vermin**

What happens if a property you have listed does not have known physical defects and is not “stigmatized” but has the potential for one or both of those circumstances due to the presence of creepy-crawly things? Must buyers be told or is a call to the exterminator enough?

- a. Presence of recognized property damaging insects is a sign of potential infestation.
  - (i) That is an adverse material fact under Idaho Code § 54-2083(1). Duty to disclose to all.
  - (ii) This is a required disclosure (“pest infestation”) under Idaho Code § 55-2508. *See Appendix.*
- b. Know your bugs. Different duties may apply, e.g., a red-ant infestation must be disclosed under property condition disclosure Act. It may not be an adverse fact once seller has hired Terminex.
  - (i) Buyer agents beware: Home inspection services often expressly exclude insect/vermin related issues from inspection services/reports.

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**NOTES**

## 9. Web-Based Resources for Real Estate Licenses

In the ever expanding cyber-information world, there are a number of easily accessible and highly helpful websites and “1-800” numbers that every real estate licensee should add to their list of resources. Here are but a few:

- ◆ www.annualcreditreport.com
  - a. Allows you to get one free credit report annually.
    - (i) Credit reports are not just for lenders anymore. (Remember CLUE insurance issues in § II b (ii).)
  - b. Just fill out the form on-line.
  - c. Also available by calling 1-877-322-8228.
- ◆ FHA/HUD: <http://www.hud.gov>
  - a. Access to regulations, information and links on numerous FHA/HUD topics.
  - b. Content not updated very often, but good general information source.
- ◆ National Credit Reporting Bureau: 1-888-5-OPTOUT.
  - a. This phone number connects you to an automated menu that allows you to prevent the consumer credit reporting companies from using your credit information for pre-approved offers of credit or insurance.
    - (i) You actually can opt out of pre-approved credit card offers.
    - (ii) You can also do this on-line at [www.optoutprescreen.com](http://www.optoutprescreen.com).
    - (iii) No person is available to talk to at that phone number.
  - b. The four main consumer credit reporting agencies are included:
    - (i) Equifax;
    - (ii) Experian;
    - (iii) Innovis; and
    - (iv) TransUnion.
- ◆ Federal Trade Commission (FTC) Website at: <http://ftc.gov/privacy/protect.htm>
  - a. If you go to this site, there are links to other websites such as ([www.optoutprescreen.com](http://www.optoutprescreen.com)), the major credit bureaus and the Direct Marketing Association to stop unwanted mail, e-mail or telephone calls.
  - b. Unsolicited credit and credit card offers are a leading source of identity theft problems.
    - (i) If you go to the Federal Trade Commission (FTC) home page, there are other links for consumers, including links that tell you what to do in the event of identity theft. The link will send you to: [www.consumer.gov/idtheft/](http://www.consumer.gov/idtheft/).
    - (ii) Idaho Attorney General Office (1-800-432-3545) Consumer Protection Unit has resources on identity theft, financial privacy and telephone privacy. [www2.state.id.us/ag](http://www2.state.id.us/ag).
- ◆ Factfinders. <http://factfinder.census.gov>
  - a. Allows you to immediately retrieve large volumes of information about

any city, county or state.

- (i) Invaluable for marketing purposes, development and trend evaluations and relocation services.
- (ii) Site covers all sorts of population, housing, economic and geographic data.

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## NOTES

# From Here, Now Where?

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Personal experiences  
in living and working  
with diverse cultures

Diversity as a  
concept and value

Benefits of cultural  
diversity for business  
viability and  
community prosperity

...and More

Developed and  
Presented by:  
Vincent M. Kituku,  
Ph.D.

© 2005, All rights reserved.  
**KITUKU & ASSOCIATES**  
P.O Box 7152, Boise, ID  
83707  
Toll Free 1-888-685-1621  
Phone/fax (208) 376-8724  
**E-mail [Vincent@Kituku.com](mailto:Vincent@Kituku.com)**  
**or [www.kituku.com](http://www.kituku.com)**

## Living and Working with Cultural Diversity for Real Estate Agents



Dr. Vincent Muli Wa Kituku, the principal consultant of Kituku & Associates, works with organizations to increase productivity through employee and leadership development programs. Dr. Kituku, a native of Kenya, Africa, draws on his rich cultural heritage and his in-depth experience in corporate America to provide individuals and organizations the necessary tools to not only survive but thrive in chaotic times.

The International Federation for Professional Speakers recently awarded Dr. Kituku the Certified Speaking Professional designation (CSP), the highest designation for speakers, which has been earned by fewer than ten percent of the 4,600 speakers who belong to the organization. He was the recipient of the Better Business Bureau 2000 Integrity Award and was the 2003 Homecoming Grand Marshall for Boise State University. He has won numerous state, national and international awards as a speaker and writer.

Dr. Kituku received his Bachelor of Science degree from the University of Nairobi and both his Masters and Doctorate from the University of Wyoming. An active adjunct professor at Boise State University, Dr. Kituku has worked with the University of Idaho, Idaho State University, College of Southern Idaho, Arizona State University, Bloomsburg University, Oregon State, University of Montana, and George Fox University among other institutes of higher learning. He has presented to more than 200 schools (high schools and elementary schools) in Idaho.

Vincent has served as a board member of the Governor's Coordinating Council for Families and Children (he is a past Chairman of Awareness Committee); Boise Rescue Mission Ministries (he also serves on the Human Resources Committee); and the Idaho Black History Museum. He serves at the advisory level for Assistant League of Boise as well as the YMCA (he also serves on their diversity committee). He is a past member of the board of directors for Women and Children's Alliance.

# Living and Working with Cultural Diversity

Understanding the cultural dynamics that drive spending power in communities is critical for business viability, especially in the housing sector. In this educational workshop, Living and Working with Cultural Diversity, participants will learn different cultural practices and perceptions that impact their businesses. Topics addressed in this presentation include but are not limited to:

- Personal experiences in living and working with diverse cultures.
- Diversity as a concept and value.
- Impact of affirmative action and fair housing laws on diversity related issues.
- Benefits of cultural diversity for business viability and community prosperity.
- Demographic factors that affect how people spend their resources.
- Benefits and how to promote cultural differences where we live and work.

## Course objectives

- Recognize personal experiences in living and working with diverse cultures.
- Identify cultural perceptions, stereotypes, and prejudice and how these are related.
- Understand diversity as a concept and value.
- Understand the relationship between diversity aspects and the impact of affirmative action and fair housing laws.
- Recognize the benefits of cultural diversity for business viability and prosperity.
- Be constantly aware of demographic factors that affect how people spend their resources.
- Understand how to promote cultural differences for business opportunities.
- Understand decision-making processes that lead to sales.
- Recognize the role of feelings in decision-making and negotiations.



# Personal Experiences in Living and Working With Diverse Cultures



- ® Teacher/Student Relationships
- ® Hugging
- ® Attitude Towards Body Weight
- ® Eye Contact
- ® Together in Labor Room
- ® Dating and Proposal for Marriage
- ® Massaging and Coffee in Sanctuaries

Think of the times you moved from one city to another or you changed from being single to married or started your first job after school. What are some of the major behavior changes you experienced?

What are some of the things you've learned?

What behavior shifts do you make daily as you shift from work environment to home or visit a client who has a different background?

What are the main cultural challenges that face you on your day-to-day business routine?

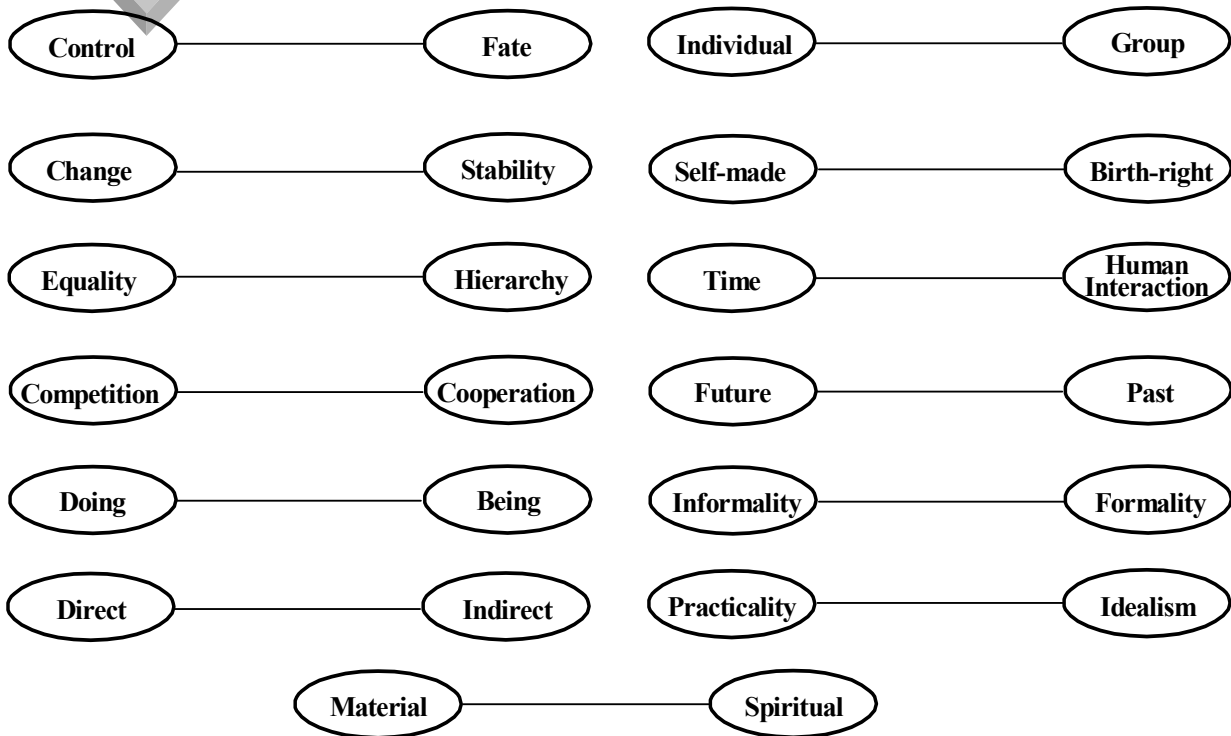
**NOTE:** To understand how cultures influence people, it is necessary to understand how you are influenced by your own culture. If you don't know your own cultural influences, you are likely to misunderstand and misinterpret the cultural experiences of other people. If we acknowledge our own culture, we are likely to hold ourselves accountable for creating business environments and communities that can accommodate cultural differences.

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## NOTES

# The Relationships Among Individual and Global Values



Adapted from the work of L. Robert Kouns

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NOTES

# Perceptions, Stereotype and Prejudice

Perceptions are one's observations and/or understanding of a part or the whole entity. We develop and accept our view of the world based on what we learn from our environment through what is said, felt, done or thought. Without understanding why others do or feel or say or think the way they do, our perceptions may become bias. Biasness may lead to prejudice and/or stereotyping.

When doing business with people of a culture that is different from yours, you have to know that your perceptions and those of your client/customer may be different, but that does not make either yours or theirs of any less value. To succeed in business, you have to never expect others to do business "just like you." While in the past many immigrants were forced to conform to the practices of the dominant cultures, it is crucial to know that the future is different. Those immigrants can now get services that they want, how they want them, and when they want them, elsewhere.

Examples of perceptions that may hinder business transaction:

A client who considers being asked, "What can I do for you?" to be rude and cold.

A client who may be offended if you don't recognize (greet) all members of his party.

A client who will think you belittle him or her if you don't consider their age or social status.

A client who may feel uncomfortable by your "too personal comments."

A client who may conclude that you are unprofessional because of your facial gestures.

Cultural biasness starts the moment we think of others as "these people are..." as opposed to how we are. We all have biases—preferences or points of view that limits how we see, think or act in a situation. Our biases are the byproduct of generalizations. And they affect how we do business transactions with people from different cultures. A generalization that reflects on all members of a given culture or family is referred to as stereotype. If biasness leads to viewing differences portrayed by others as weakness, or uncivilized, then stereotypes become prejudice.

How can you help eradicate stereotyping?

Speak out when you hear generalizations, especially negative comments.

Don't join others in remarks or jokes that are racial or belittle other people's faith or are sexist.

Be a global student of other cultures, but start by being an expert of your own culture.

# Examples of Misperceptions

## *Common Myths about the Poor*

From the following examples you can see that perceptions about the poor, welfare programs, and welfare recipients are shaped more by myth, anecdote, and misinformation than research.

Myth #1: Most of the poor are Black or Hispanic.

Reality:

- Poverty rates are higher among Hispanics and African Americans, but they are not the majority of the poor.
- Whites are the largest racial group in poverty (more than 48% of the poor), while Blacks are 27% and Hispanics are 22%.

Myth #2: People are poor because they don't want to work.

Reality:

- Half of the poor are not in the working ages:
  - a) About 40% are under age 18.
  - b) 10% are over age 65.
  - c) Many poor people have jobs with below-poverty wages.

Myth #3: The poor are in a cycle of poverty that few escape.

Reality:

- Ø The poverty population is dynamic and people move in and out of it.
- Ø Only 12% of the poor are in poverty for five or more consecutive years.

Myth #4: Most poor live in inner-city neighborhoods.

Reality:

- Less than one-quarter live in high poverty inner-city areas.
- Over 36% of the poor live in the suburbs, and more than 20% live outside metropolitan areas.

Myth #5: The poor live off of government welfare.

Reality:

- Welfare accounts for only one-fourth of the income of poor adults.
- Social Security, which is not based on need, contributes about 22% of the income of the poor.
- Half of the income received by poor adults comes from wages or other work-related activity.
- Only 40% of the poor receive cash welfare payments.

# Diversity as a Concept and Value

*Diversity* is the concept that the thoughts and actions of individuals differ because of gender, age, physical or mental condition, ethnicity, education, religion, and cultural factors.

The recognition of human behavior means that people must understand each other's differences in order to positively interact in their communities. Understanding each other starts with a willingness to communicate and serve each other.

The recognition and understanding of differences is the basis for inclusion of individuals who are different from ourselves. When a community recognizes and understands the benefits brought by having different ethnic groups, diversity becomes a beneficial human resource.

## **Diversity as a Value**

People who recognize diversity as a benefit with respect to both their own individuality and that of others are likely to be comfortable doing business with people from different backgrounds. This respect leads them to get to know a person before assessing that person's abilities or judging that person's worth. Diversity cannot survive as a community or an organization's concept unless its benefits are acknowledged at a personal level.

## **Diversity Vs. Affirmative Action**

Diversity is neither a disguise for quotas, nor is it synonymous with Affirmative Action. Affirmative Action programs were created to enhance opportunities for people who had been denied such opportunities because of economic, educational, or social status differences. This denial of opportunity was the result of racial, gender, age, economic and disability discrimination. These corrective or compensatory programs are mandated by legislation, judicial order, or administrative directive as a condition to the continued receipt by an organization of public funds or the right to operate under a license subject to governmental regulation. The mandatory nature of these programs sometimes leads to resistance or resentment.

Diversity is a concept and a value, but it is not a program. It is by no means mandatory and there are no legal penalties for refusing to acknowledge the value of another person who is different. However, diversity offers its own set of rewards.

- ♦ **Clients enjoy working with businesses and persons that make them feel valued.**
- ♦ **People of diverse background offer different perceptions and abilities in finding innovative solutions to problems and in creating a broad range of goods and services.**

# Affirmative Action and Fair Housing Laws

Because of common practice of discriminatory treatment of some groups and/or individuals who desired to purchase houses, Fair Housing Laws were established to curtail that practice. The objective of Fair Housing Laws is to enable all people regardless of their race, color, sex, nationality, religion, or physical abilities, to choose based on their financial capability, the home and neighborhood they want to live in.

Civil Rights Acts that enforce Fair Housing Laws are:

Civil Rights Acts of 1866:

This act guaranteed all citizens of United States of America equal rights to “inherit, purchase, lease, sell, hold and convey real and personal property.”

Fourteenth Amendment of the Constitution in 1868:

This amendment was enacted to guarantee civil rights and full citizenship to African-Americans.

Equal Opportunity in Housing Executive Order of 1962:

This Executive Order, proclaimed by president John Kennedy, prohibited any kind of discrimination in the selling, renting and use of any residential property that was either owned or operated or financed by the federal government.

Civil Rights Acts of 1964:

This law made discrimination in public accommodations illegal by specifically prohibiting discrimination against individuals based on their nation of origin, color, sex, race, and religion in all programs assisted by the federal government.

Housing and Community Development Act of 1974

This Act was enacted to prohibit discrimination based on an individual’s gender.

Fair Housing Amendment Act of 1988:

This amendment was enacted to have civil rights protection for individuals with physical and mental challenges and families with children.

Real Estate Agents are not only expected to view their “adherence to affirmative action and fair housing laws as a minimally acceptable level of service to consumers” as stated by Carmel Streater, but also “to make an effort to seek out persons in the protected classes to serve.”

## Essential Elements to Keep in Mind About Fair Housing Laws

- It is prohibited to advertise sales and/or rental of residential properties in a manner that suggests discrimination or preference to members of the protected classes.
- Blockbusting is prohibited...that is acting in a manner that encourages owners of property in a community to sell due to expected immigration of persons from the protected classes.
- Steering is prohibited...that is acting in a manner that directs persons of protected classes away or towards some communities.

Advantages of implementing affirmative action for brokers/real estate agents:

- It is morally the best practice to do business in a diverse community.
- You attract buyers and sellers from all cultural backgrounds.
- You may increase your business since members of protected classes are more likely to seek for services/products from businesses that are referred to them by people they can relate to.

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### NOTES

# Demographic Factors that Affect How People Spend Their Resources

## **Key aspects to remember when doing business:**

Persons of diverse ethnic groups, religions and other cultural backgrounds may join either in marriage or business partners. As such, it becomes difficult to categorize their habits or behaviors based on what you know from a single entity. Further, people's beliefs and lifestyles are altered by experiences such as education, travel, or grief--again showing the importance of never considering ourselves as "experts" in other people's way of life.

With all the myriad of cross-cultural challenges, there are three general decision-making styles - **Consensus**, **Individual** and **Collaborative**- that are common when people are purchasing items of importance. There are cultures where all members of a family or a group have to agree before a final decision is made—this is consensus decision-making style. In other cases a decision is made by an individual even when there are others who might be affected by his/her decision—this is an individual decision-making style. The third style is when two or more members of a family or a group contribute in the decision-making process regardless of their influence—this is collaborative decision-making style.

## **What to Do:**

- Establish rapport by either showing genuine interest to learn more of your client's culture or by focusing on the similarities between their culture and yours.
- Listen before asking questions or commenting about an issue.
- Try to understand who in the family or group makes the final decision, and never underestimate the power of members of extended family from some cultures.
- Make an effort to genuinely respect other people's opinion even if you don't agree with them.
- To be on the safe side, recognize all people introduced to you by your client and try to learn through observations.



### **What to Watch Before Your Client(s) Stop Your Relationship:**

- Family structure: Not all families are alike. When dealing with a family that is either selling or buying their property, you may be surprised by who does what or says what and when.
- The behavior, or dress code or hairdo of your client's children can be another area where your opinion is best when kept to yourself.
- In some families, children are there to be heard and seen. Man and woman have equal influence in the decision making process. Your major task from the moment you meet with a family is to listen and observe interactions that can lead you to connecting positively.
- Politics: Someone once said that the word politics is a combination of two words *poly* (*meaning* many) and *ticks*. A simple statement from a salesperson on his political views can turn a deal that was heading in the right direction into a failed sale.
- Religion: There is probably just one safe way for you, the salesperson: Show respect to your client's religion.
- Ethics: This can be a silent killer for sales that seemed promising. Not everyone believes in "cutting corners."

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### **NOTES**

# Promoting Cultural Differences Where We Live and Work

## Strategies of Promoting Cultural Differences:

1. Attend community events that are sponsored by persons from different cultures.
2. Be open-minded and avoid assumptions about others.
3. Be willing to admit ignorance and ask questions that will aid in understanding other people's culture.
4. Be the expert of your own cultural development and willing to share that expertise with others.
5. Be sensitive to the cultural differences of others and don't be hypersensitive about your own differences.
6. Avoid confrontations based on differences and focus on similarities so as to find harmonious solutions.
7. Appreciate the value in cultural differences and offer ways to help involved parties contribute in decisions that lead to transactions.
8. Make decisions and take actions based on qualifications and performance and avoid discrimination.
9. Treat persons of different cultural backgrounds as equals and avoid feelings of superiority or inferiority.

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## NOTES

## LEGISLATIVE UPDATE 2005



Education Council Chair Gail Heist has been actively involved in real estate for more than 34 years as a developer, consultant, broker and educator. He is a certified real estate instructor, and is owner/director of the Academy for Real Estate Careers.

The following outline summarizes legislation that was enacted in the 2005 session of the Idaho Legislature that the authors have deemed relevant to the practice of real estate brokerage and real estate law. The legislation is identified by the bill number and the section of the Idaho Code affected by the legislation. Each item of legislation is effective on July 1, 2005, unless otherwise indicated. This outline is only a topical summary, and the reader is advised to review the actual Idaho Code sections for specific information.

### **1. SB 1122- CLANDESTINE DRUG LABORATORY CLEANUP ACT**

**Idaho Cod 6-2601 through 6-2608**

**Effective July 1, 2005**

A new chapter was added to state law that directs the Department of Health & Welfare to establish a program providing for the cleanup of 'Clandestine Drug Laboratories', forcing former methamphetamine labs and homes to be cleaned up before being occupied. Health & Welfare must create standards and a process for cleaning up the labs and creating a tracking system so an affected residential property can be added to, and removed from, the system.

The law enforcement that discovers the meth lab will be charged with notifying the residential property owner and the Department. Once the property has met the cleanup standards defined by Health & Welfare, the residential property owner and any representative or agent of the residential property owner shall be immune from civil actions involving health claims brought by any future owner, renter or other person who occupies the residential property, and by any neighbor of such residential property, where the alleged cause of injury or loss is based upon the use of the residential property for the purposes of a clandestine drug laboratory, provided however, that such immunity shall not apply to any person alleged to have produced the clandestine drugs.

## **CONSTRUCTION**

### **2. HB163 CONTRACTOR REGISTRATION**

**Idaho Code 54-5201 through 5219**

**Effective 03/25/2005**

This new law requires building contractors to register with the Bureau of Occupational Licenses. A contractor licensing board will be appointed to oversee the implementation of the program. Contractors will be required to register with the board at a cost of \$25 per year, carry a minimum of \$300,000 general liability insurance, prove they have worker's compensation insurance, if required by existing law, and certify they have never been kicked out of this or any other state's registration program. The Board will be made up of four contractors, from each of the four geographic areas of our state, plus one public member.

Those performing work on their own property are not required to register as long as they are not buying houses as a business with the intent to fix them up and sell them to the consuming public.

Also, a Real Estate Licensee who, "incidental to a regulated real estate transaction assists his clients in scheduling or performing nominal maintenance and repairs," is NOT required to register. However, if a real estate agent were acting as a builder or developer in a capacity outside of a regulated transaction, he or she would be required to be registered as a contractor.

## **ECONOMIC DEVELOPMENT/TAX CHANGES**

### **3. HB306-CORPORATE HEADQUARTERS INCENTIVE ACT**

**Idaho Code Section 63-2901 through 63-3067**

**Effective 01/01/2005**

Touted as an economic development package, this bill provides qualifying businesses with:

#### **Income tax credits:**

- A six percent investment tax credit with no credit limitation;
- An additional new jobs tax credit with a graduated scale starting at \$1,000 per job and climbing to \$3,000 per job;
- A ten percent real property improvement tax credit for investment in headquarters;
- And administrative buildings of up to \$500,000 in any one year.

A temporary property tax abatement for new headquarters and administrative buildings of up to \$2 million in any year. The state, not local governments, pays the abatement.

A temporary sales tax abatement for materials used in new headquarters and administrative buildings.

To qualify a company must:

- Create at least 500 new jobs in Idaho;
- Jobs must have a starting annual salary of at least \$50,000 per year, plus benefits;
- Invest at least \$50 million in new headquarters and administrative buildings, within a five-year period. Existing recapture provisions apply.

### **TITLE COMPANIES-ESCROW-FINANCE**

#### **4. H159 IDAHO ESCROW ACT**

**Idaho Code 30-901 through 30-935; 45-1504**

**Effective 07/01/2005**

This bill enacts a law regulating escrow agencies to enable the state to protect Idahoans who use escrow services. Idaho was one of the few states that did not have a specific law regulating escrow agencies not offering title insurance. These laws protect members of the public who entrust an escrow agency with their funds and property.

This is an area where the Department of Finance has received an increasing number of inquiries. The problem of fraudulent Internet escrow services infiltrating legitimate websites, such as in eBay Auctions and Amazon Z-shops, has become epidemic. Other states have strengthened their escrow laws because of significant problems connected with escrow agencies, including increased bankruptcies leading to consumers' loss of funds.

This bill also amends Idaho Code Section 45-1504 to authorize Idaho chartered trust institutions to act as trustees of trust deeds in Idaho and to remove a twenty (20) day waiting period for notification of the intent to appoint a successor trustee. These changes will make Idaho's trust deeds law more consistent with other states, reduce interest charges, and speed up the debt recovery process. To promote and protect the public welfare, the Department of Finance is also seeking to repeal Chapter 9, Title 30, Idaho code, the Guaranty, Title, and Trust Company Act. That Act, adopted in 1901, is irreparably outdated and provides no real public protection. Allowing companies to engage in the businesses authorized by that Act, subject to no meaningful regulation under the Act, places the public at risk. Activities authorized by the Guaranty, Title, and Trust Company Act are comprehensively addressed by other provisions of Idaho law.

#### **5. HB88 IDAHO FINANCIAL FRAUD PREVENTION ACT**

**Idaho Code(s) 67-2750 through 67-2762; 26-3701 through 26-3715; 26-1111; 26-2226; 26-2501 through 26-2505**

**Effective 07/01/2005**

Idaho's financial institutions, other industries regulated by the Department of Finance, and their customers are subjected to large losses each year due to fraud. Although the fraud is typically a crime, often it is not prosecuted. This new act will authorize the

Department to investigate and bring civil enforcement actions against persons who perpetrate fraud against financial institutions, including non-depository institutions, and their customers. The law would also allow referral of actions to criminal law enforcement agencies.

### **Economic Development**

#### **6. HB323 SMALL EMPLOYER INCENTIVE ACT**

**Idaho Code 63-4401 through 63-4409; 63-606A**

**Effective 01/01/2005**

The Idaho Small Employer Incentive Act of 2005 provides qualifying businesses with Income tax credits:

- A 3.75% investment tax credit with a credit limitation of 62.5%;
- An additional new jobs tax credit with a graduated scale starting at \$1,000 per job and climbing to \$3,000 per job;
- A 2.5% real property improvement tax credit for investment in headquarters or administrative buildings of up to \$125,000 in any one year.

A temporary sales tax abatement of 25% for materials used in new headquarters and administrative buildings.

To qualify a company must:

- Create at least 10 new jobs in Idaho;
- Jobs must have a starting salary of \$40,000 per year, plus benefits;
- Invest at least \$50,000 in new facilities and equipment for each new project employee added in Idaho;
- Accomplish this within a five-year period.

Existing recapture provisions apply. Conveys authority to county boards of equalization to exempt new plant investment at project site from property taxation.

### **TRUSTS & ESTATE INFORMATION**

#### **7. SB1071- TRUST AND ESTATE DISPUTE RESOLUTION ACT**

**Idaho Code 15-8-101 through 15-8-103; 15-8-201 through 15-8-212; 15-8-301 through 15-8-303**

This new law provides a non-judicial method to resolve disputes involving trusts and estates. It also provides for judicial resolution of disputes if a non-judicial resolution is not obtained.

## **FARM & RANCH INFORMATION**

### **8. HB 36 LOCAL GOVERNMENTS PROHIBITED FROM FERTILIZER REGULATION**

**Idaho Code 22-626**

**Effective 07/01/2005**

Prohibits local regulation and legislation relating to fertilizers; to provide that local ordinances relating to fertilizers are void and unenforceable; and to clarify that specified restrictions shall not preempt certain county or city local zoning ordinances.

### **9. HB 37 LOCAL GOVERNMENTS PROHIBITED FROM SOIL & PLANT AMENDMENTS**

**Idaho Code 22-2226**

**Effective 07/01/2005**

Provides that local ordinances relating to soil and plant amendments are void and unenforceable and to clarify that specified restrictions shall not preempt certain county or city local zoning ordinances.

### **10. HB401- PURE SEED LAW-STATE REGULATION**

**Idaho Code 22-413**

**Effective 07/01/2005**

Some political subdivisions below the state level may consider regulating the planting, sale, storage, or distribution of certain types of varieties of seed. Such regulations may conflict with existing state law and are often not based on principles of good science. This legislation makes clear that the regulation of seed will be done by the state to insure consistency statewide. This law change will not interfere with local zoning ordinances on the location of seed handling facilities.

### **11. HB 139 – TELEPHONE/ELECTRIC PUBLIC UTILITIES/PROPERTY OWNERS, LICENSE EXEMPT**

**Idaho Code 54-1016**

**Effective 07/01/2005**

This legislation exempts governmental agencies, regulated utilities, telephone companies, property owners, and operating plant maintenance electricians from the National Electrical Code (NEC) as implemented by the Idaho Electrical Board.

Any property owner performing electrical work in the owner's primary or secondary residence or associated outbuildings or any person regularly employed as a maintenance electrician performing electrical maintenance work on the premises of the person's employer may do so without having an electrical license.

**12. HB141-ELECTRICAL CONTRACTORS-PROVIDE PROOF OF LIABILITY INSURANCE/WORKER'S COMPENSATION INSURANCE**

**Idaho Code 54-1003 to 54-1015**

**Effective 07/01/2005**

An electrical or specialty contractor, prior to being issued a license and upon his license renewal, shall be required to provide proof of liability insurance in the amount of three hundred thousand dollars (\$300,000) and proof of worker's compensation insurance if applicable.

At present, other bureaus in the Division of Building Safety, Plumbing and HVAC, require proof of financial protection for consumers. Many electrical contractors have specialty licenses within the Plumbing and HVAC bureaus and are required to provide proof of consumer financial protection for those specialty licenses. This legislation would make evidence of financial responsibility consistent for the Division of Building Safety Bureaus.

**13. SB1039 CONDOMINIUMS-TO PROVIDE FOR SERVICE OF PROCESS UPON A MANAGEMENT BODY OF A CONDOMINIUM DEVELOPMENT THAT HAS BEEN INCORPORATED**

**Idaho Code 55-1512**

**Effective 07/01/2005**

This legislation amends the method of service of process on a corporation formed for condominiums. It provides that service of process on a corporation shall be on the registered agent of the corporation.

**14. H0222-TAXPAYER INFORMATION**

**Idaho Code -9-340D**

**Effective 03/15/2005**

This new law provides that records of a county assessor containing information showing the income and expenses of a taxpayer, which information was provided to the assessor by the taxpayer to permit the assessor to determine the value of property of the taxpayer, shall be exempt from disclosure under the Public Records Act.

This will allow a business to voluntarily provide confidential financial information to a county assessor for the assessor to use in the process of determining the fair market value assessment of the property. All such financial information being voluntarily provided will not be subject to public disclosure.

**15. HB 27-TAX COLLECTION- TO PROVIDE THE MANNER OF SERVICE OF A NOTICE OF LEVY AND DISTRRAINT BY THE STATE TAX COMMISSION**

**Idaho Code 63-3061A**

**Effective 07/01/2005**

Current Idaho statutes authorize the State Tax Commission to collect tax assessments by "levy and distraint" (seizure) of property. However, the law does not specify the manner in which the Commission must give notice to taxpayers or holders of property



subject to seizure. This law provides the manner in which notice can be given.

Subsection (1) allows three options:

1. Notice in person,
2. Notice at the dwelling place or usual place of business, or
3. Notice by certified mail to the person's last known address.

These options conform to the federal law provisions governing the IRS.

Subsection (2) clarifies that by agreement with the party receiving the notice the State Tax Commission may give the notice electronically, in conformity with the Uniform Electronic Transactions Act.

## **16. HB249 PERSONS WITH DISABILITIES**

**Idaho Code 67-5901 through 67-5911**

**Effective 07/01/2005**

Adds Titles I and III of the Americans with Disabilities to Idaho law. Amends existing law relating to prohibitions against discriminatory practices to include prohibitions against discrimination against persons with disabilities; to provide additional limitations on the application of this act; and to prohibit reprisals for taking actions pursuant to this act.

This new law adds disability to the current prohibitions of discrimination in connection with public accommodations (private businesses).

Provide a user friendly, one-stop destination for businesses and people with disabilities to easily access mediation and/or enforcement on a local level, through the Human Rights Commission. Allows better access to persons with disabilities.

Define "readily achievable" as something that a private business can do without much difficulty or expense. The proposed changes add to state law those obligations already applicable to private businesses under federal law. Government entities are not affected by the changes regarding places of public accommodation.

## **17. HB110 ELECTRIC GENERATION**

**Idaho Code 63-3622QQ**

**Effective 04/12/2005**

**Sunset 07/01/2011**

This legislation will provide an exemption to the sales and use tax for purchases of machinery and equipment used in directly generating electricity using fuel cells, low impact hydro, wind, geothermal resources, biomass. co-generation, sun or landfill gas as the principal source of power. The exemption will sunset July 1, 2011.

## **18. HB78 CONSERVATOR POWERS - PROPERTY**

**Idaho Code 15-5-420**

**Effective 07/01/2005**

This legislation amends existing law to provide for conservator powers over titles to property of a protected person's estate. Until termination of his appointment, a conser-

vator has the same power over the title to property of the protected person's estate that an absolute owner would have, provided however, that such power is held in trust for the benefit of the protected person. This power may be exercised without notice, hearing, or order of the court.

When a conservator is appointed for either a minor or a person with a disability of some nature, some questions have arisen as to the exact nature of the title vested in the conservator on behalf of the protected person. This law change clarifies how the title to property is held by the conservator and how it may be exercised.

## **19. SB1086 MEDICAL ASSISTANCE-RECOVERY OF CLAIMS FROM ESTATE**

### **Idaho Code 56-218**

#### **Effective 07/01/2005**

Amends existing law to govern procedures for claims for recovery against the estate of deceased recipients of medical assistance to provide a procedure for an exempt property allowance claim.

Idaho Code 56-218 provides for the recovery of medical assistance (Medicaid) payments made after the recipient reaches age 55, from the probate estate of the Medicaid recipient and the recipient's spouse. Recovery is made only after the death of both spouses and only when there is no minor or disabled child. Recovery is made through the probate estate process, but can be made from all of the couple's assets, including those assets otherwise passing outside probate through trusts, life estates, and similar arrangements.

Sometimes the Medicaid recipient's home is abandoned by family members who do not wish to open probate. In such cases the Public Administrator (the County Treasurer) is appointed to administer the estate which may consist only of the decedent's home. The change to the Medicaid lien provision would permit the Department to foreclose its Medicaid lien directly (after the death of both spouses), instead of recovering through the probate estate. This process would avoid unnecessary time and expense of the Department, the Public Administrators, and the probate courts. The time frame for filing a lien is also increased from two years to three years to comport with the change made to the probate code in 2004 which allows three years to file a probate claim.

The exempt property allowance is intended to permit a decedent's children to keep a limited amount of family mementos and heirlooms. However, the probate code permits the exempt property allowance to be paid in cash or from other assets of the estate such as the real property. Neither Oregon nor Washington permit such payments ahead of Medicaid estate recovery. The change to the priority language would allow the adult children of Medicaid recipients to keep items of personal property up to \$10,000 in value, but would not allow cash payment of the allowance or payment made from other assets of the estate until the Medicaid claim has been paid.

Language referring to the Director's subpoena power has been added to permit the Department to locate and discover assets of decedents whose estates are subject to claims by the Department. The Department shall have all of the rights of a mortgagee in the enforcement and collection of the lien.

## **20. S1070- PURPOSE TRUSTS**

**Idaho Code 15-7-601**

**Effective 07/01/2005**

Idaho Law currently does not appear to allow the creation of what are called "purpose trusts". Nevertheless, such trusts have been created in Idaho and are being administered by Idaho banks and other trustees. This bill clarifies that such trusts may be created and sets terms and conditions for their operation.

Specifically, purpose trusts have no beneficiary, but are created to carry out a specific purpose, such as preservation of a building. These trusts expand the estate planning options for the public at large. The bill also eliminates any question as to whether existing purpose trusts currently being administered by Idaho trustees are valid.

## **WATER LAW BILLS**

Time was running out on a one-year compromise to avoid a shutoff of water from hundreds of wells pumping water from the Eastern Snake Plain Aquifer. The following packet of bills were made a part of law, and are noted here in the event this information is important for some students.

## **21. H152- SNAKE RIVER RIGHTS AGREEMENT**

**Effective: Governor's Proclamation certifying all conditions of the Snake River Water Rights Agreement of 2004 have been satisfied.**

## **22. H153 – WATER RENTAL - FLOW AUGMENTATION**

**Idaho Code 72-1763B**

**Effective 01/01/05**

## **23. H154- MINIMUM STREAM FLOW**

**Idaho Code 42-1507 & 42-1765**

**Effective: Governor's Proclamation certifying all conditions of the Snake River Water Rights Agreement of 2004 have been satisfied.**

The purpose of bills listed above was to ratify a multimillion dollar water agreement, the Snake River Water Rights Agreement of 2004, with the Nez Perce Tribe that calls for the Nez Perce to drop their claims to nearly all the water in the Snake River Basin in exchange for annual rights to 50,000 acre-feet of water in the Clearwater River, \$80 million in cash and land, and a pledge from the state and federal governments to provide additional moneys for fish habitat and other environmental improvements.

The combined amount of federal dollars made available under this agreement to the State, local government, and private individuals is approximately \$95 million.

**24. HB394 - GROUND WATER DISTRICTS****Idaho Code 42-5201 through 5259****Effective 04/12/2005**

This law makes membership in groundwater districts and payment of assessments mandatory for all groundwater irrigators, unless granted an exclusion.

**25. HB373 – WATER RIGHTS****Idaho Code 42-1740; 42-1753; 42-1754****Effective 04/12/2005**

This law gives the Idaho Water Resources Board authority to issue revenue bonds to acquire water rights to be funded by revenues received from assessments, leases or fees paid by water users.

**26. HB374 – WATER DISTRICTS****Idaho Code 42-620****Effective 07/01/2005**

Authorizes the Department of Water Resources to collect a special annual assessment from water users within water districts on the Eastern Snake River Plain to pay the added state administration costs attributable to implementing, monitoring, and enforcement provisions involving the Eastern Snake River Plain Aquifer.

**27. H 392 WATER APPROPRIATION BILL****Effective: 04/07/05 Sections 1 through 4; 07/01/05 All other sections**

Appropriating \$24.4 million to purchase water rights owned by the Bell Rapids Mutual Irrigation Company, and then authorizes the Idaho Water Resource Board to lease part of those water rights to the Bureau of Reclamation.

**28. HCR 28- HOUSE CONCURRENT RESOLUTION**

Asks the Idaho Water Resources Board to work with the Legislature's Natural Resource Committee to assess water supplies and develop a plan for a managed recharge program for the Eastern Snake Plain Aquifer.

**29. H299 HOMEOWNER EXEMPTION****Idaho Code 63-602G****Effective 01/01/2005**

This legislation allows residential improvements to still qualify for the fifty-fifty homeowners exemption when the property has been leased because the owner is absent in the current year by reason of active military service in a designated combat zone.

**30. HB26 INCOME TAXES-REAL ESTATE INVESTMENT TRUSTS (REIT)****Idaho Code 63-3022****Effective 01/01/2005**

This bill taxes Real Estate Investment Trusts (REIT) on income earned from investments in Idaho realty. It requires a REIT to add its federal deduction for dividends paid to its federal taxable income when calculating Idaho taxable income. As a result,

income earned on real property in Idaho will be subject to the Idaho corporate income tax and not exported to the state in which the investor resides.

### **31. H0165 INCOME TAX – CAPITAL GAINS**

**Idaho Code 63-3022H**

**Effective 01/01/2005**

This measure would shorten the holding period required for Real Estate transactions from eighteen (18) months to twelve (12) months to qualify for long-term Capital Gains taxation. This proposal would bring Idaho into Federal Internal Revenue Service compliance for tax treatment of long-term capital gains.

### **32. HB281- LOCAL LAND USE PLANNING – SURFACE WATER FOR IRRIGATION**

**Idaho Code 67-6537**

**Effective 07/01/2005**

This legislation requires use of surface water for irrigation on lawns and landscaping when available. The intent is to encourage the use of surface water for new land uses. All applicants proposing to make land use changes shall be required to use surface water, where available, as the primary water source for irrigation and other authorized purposes.

When considering amending, repealing or adopting a comprehensive plan, the local governing board shall consider the effect the proposed amendment, repeal or adoption of the comprehensive plan would have on the source, quantity and quality of ground water in the area.

### **33. HB72 RESIDENTIAL MORTGAGE PRACTICES ACT**

**Idaho Code 26-3103**

**Effective 07/01/2005**

The purpose of this bill is to remove exemption language within the Idaho Residential Mortgage Practices Act that is internally incompatible with the loan originator licensing provisions within that Act.

### **34. SB 1008- BCOO CLASS DESIGNATED BROKER REQUIREMENT- BRANCH MANAGERS MUST BE BROKERS**

**Idaho Code 54-2015 & 54-2016**

**Effective 07/01/2005**

Law change, which requires that all individuals applying to be licensed as a broker-age's designated broker, or to manage a licensed branch offices, so they will have the education and experience necessary to perform their supervisory responsibilities.

All branch office managers must now be licensed at the broker level, rather than having a salesperson's license plus two years experience. **Any current branch office manager will be required to obtain a broker's license within one year of the date of enactment of this Idaho Code.**

All persons applying to be a designated broker or branch office manager must have taken, within the past five years, an approved "Business Conduct and Office Operations (BCOO) course.

Out of state brokers will no longer be exempt from the requirement to take the BCOO course.

### **35. SB1009 – ERRORS & OMISSIONS INSURANCE CAP INCREASE**

**Idaho Code 54-2013**

**Effective 07/01/2005**

This new law increases the maximum premium for which the Commission CAN contract for a group errors and omissions insurance policy, from \$140 per licensee per year, to \$200.

Currently the group policy contract premium is \$134 per licensee. This contract comes up for renewal in October 2005 and this increase simply allows the Commission flexibility in case the contract cannot be negotiated for the current fee. Unless the Commission can obtain a contract within the statutory limit, the requirement that licensees carry errors and omissions insurance would be voided.

### **36. SB1010 – HOUSEKEEPING BILL**

**Idaho Code 54-2004; 54-2012; 54-2016; 54-2018; 54-2019; 43-2023; 54-2025; 54-2027; 54-2032; 54-2033; 54-2042; 54-2043; 54-2062**

**Effective 07/01/2005**

The Commission's annual housekeeping bill is a series of minor changes in license law. Correcting inconsistencies existing within the chapter, it moves administrative rules into the statute and updates provision to conform to current technology, business practices, and recent changes in state law.

It also clarifies the education requirements for renewing an active real estate license, and the consequences and penalties for renewing an active real estate license without having first met those requirements.

This new law change also shifts responsibility to the real estate schools to ensure that the courses being offered for continuing education credit are taught by competent instructors. It also authorizes brokerages and professional associations to restrict their certified course offerings to members.

The following is a detailed accounting of these law changes for the student to use as a reference:

- 'Commission Core Course' to be a real estate course containing curriculum, identified by the Commission, that stresses current trends and real estate practices and law changes in real estate related industries that can be no

more than four (4) classroom hours of instruction; changes 'Core course' to 'Commission Core Course'.

- Requires all licensees to notify the Commission within 10 business days of any change in mailing address.
- Sets in statute current Commission policy requiring background (fingerprint) checks to be processed BEFORE Commission accepts application for licensure.
- Requires that current license certificates for branch offices, the branch manager, and each sales associate conducting business from the branch office shall be prominently displayed or available for public inspection at the branch office.
- Continuing Education changes & clarifications:
  - Licensee shall not submit a renewal application on active status before first having obtained the CE credit hours required by the Commission.
  - A licensee who violates this shall be subject to disciplinary action by the Commission.
  - Commission may request satisfactory proof of CE compliance from any licensee who has certified that he has completed the requirement.
  - This request shall state the time the proof must be received at the Commission office which shall not be less than ten (10) business days.
  - This proof must be 'satisfactory proof' which shall consist of the following documentation:
    - § Identify the licensee, title of course or challenge exam, course certification number, course provider, number of classroom hours, the completion date of the course or exam to include:
      - Transcript of course;
      - Letter from provider verifying successful completion or course completion certificate;
      - Identifying course certification approval number to establish the course is approved for CE credit.

The Commission may, in its sole discretion, accept alternative documentation.

**Failure to submit satisfactory proof** of completing the CE requirements to the Commission may subject licensee to have his license inactivated by the Commission. He shall not be entitled to reactivate the license unless and until he provides the Commission satisfactory proof of meeting CE requirements.

Where an application to renew an active license has been granted, but is later determined that the licensee did not meet the CE requirements for an ACTIVE license, inactivation is appropriate.

**Inactive to active license-** must successfully complete the Commission Core Course, plus the required number of classroom hours of Commission approved CE coursework.

The Commission recognizes courses offered by an accredited college or university in satisfaction of a degree requirement if the course is within the approved topic areas established by the Commission.

**Licensee has a duty to keep satisfactory proof of successful completion of the CE requirement and shall submit such at the request of the Commission.**

**Certification must be obtained** by all course providers and instructors teaching any course other than a continuing education elective course. This simply reflects the policy enacted two years ago, to shift the delivery of the CE elective courses to the private sector, giving the providers of those courses the responsibility to decide instructor qualifications.

**Open Access-** Authorizes brokerages and professional associations the ability to offer courses and training exclusive to their own members and affiliates, so long as the requirements for certification are met. Continuing education credit will be granted unless such course has received financial support from the Commission for its particular course offering.

Evaluations – Upon conclusion of each course, the provider shall collect written evaluations from students for the course and instructor. For each pre-license course, the provider shall promptly submit the collected student written evaluations to the Commission and for each continuing education course, the provider shall keep such evaluations for a period of one (1) year from the course completion date. Upon written request from the Commission, the provider shall submit a written summary of the student evaluations for the course and instructor using a form approved by the Commission.

**Instructor certification not required for continuing education elective courses.** A certified provider may offer a continuing education course without obtaining approval or certification for the course instructor; provided the provider shall maintain resumes or other biographical information that documents the qualifications of the instructor to teach the continuing education elective course.

**The Commission will only certify instructors for ‘pre-license’ and the ‘Commission Core Course’;** Commission approval is no longer required for instructors teaching ‘continuing education elective courses.’

**Distance learning course-** The design and delivery of each distance learning course shall be certified by the association of real estate license law officials (ARELLO) or by another institution whose certification standards are deemed equivalent by the Commission.



The credit hours for a certified distance-learning course shall be based upon the same number of hours which would be credited for an equivalent live course and must include a Commission approved final exam.

**Trust Funds and entrusted money** – Eliminates the requirement that entrusted funds be deposited in Idaho. The broker remains responsible for the entrusted moneys and is subject to the jurisdiction of the Commission.

**Termination** – A sales associate who terminates his licensed association with a broker shall provide the broker written notice of the termination no later than three (3) business days after the effective date. A broker who terminates a sales associate shall provide written notice of the termination to the association no later than three (3) business days after the effective date.

A licensee's written notice to the Commission does not relieve him of the duty to provide written notice to the other licensee that he is terminating the relationship.

**Termination for cause** – The broker shall notify the Commission in writing within ten (10) business days of the termination.

**Additional grounds for disciplinary action** – If the licensee has had a real estate or other professional license suspended or revoked for a disciplinary violation involving fraud, misrepresentation, or dishonest or dishonorable dealings.

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## NOTES

## 2005 CASE LAW UPDATE

Justin May graduated from the University of Idaho Law School summa cum laude and served as Business Editor for the Idaho Law Review. He spent the first two years after law school as law clerk for Idaho Supreme Court Justice Jesse R. Walters. Following his clerkship, Justin has been in private practice with May, Sudweeks & Browning, LLP. Justin is certified as an instructor by the Idaho Real Estate Commission and teaches courses on Idaho real estate law for Idaho real estate brokers, agents and attorneys.

### 1. Subordination

***Blickenstaff v. Clegg*, \_\_\_ Idaho \_\_\_, 97 P.3d 439 (2004).** Loren Blickenstaff, M&D Trust, Daniel Thomas and Mark Clegg formed Calderwood East, LLC in 1999. Calderwood was created to develop a parcel of commercial property located on Overland Road in Boise. Calderwood took out a \$1.2 million loan to refinance the original purchase price for the property. This loan was secured by a deed of trust on the property.

In late 1999, Blickenstaff negotiated for Calderwood to buyout his 18% individual interest and the 27% interest of M&D Trust for which he was the trustee. Calderwood, Clegg and Thomas agreed that Calderwood would buy back Blickenstaff's individual interest for \$500,000 and M&D's interest for \$750,000. Blickenstaff was fully paid for his individual interest, but at closing learned that there was not enough cash to pay the \$750,000 due to M&D. The parties agreed to a 60 day extension to allow Calderwood to come up with the funds to buy out M&D.

Clegg as the manager of Calderwood negotiated with Thomas to obtain the necessary funds. Thomas loaned Calderwood \$1.7 million to pay off M&D and pay an \$800,000 development fee to Clegg. The Thomas loan was secured by a deed of trust on the property that was recorded on April 13, 2000.

Clegg apparently anticipated permanent financing to take out U.S. Bank, Thomas and M&D. On behalf of Calderwood, Clegg negotiated with Blickenstaff for another extension for the M&D buyout. Blickenstaff agreed to accept a six month promissory note for the \$750,000 secured by a deed of trust on the property. This deed of trust, in favor of M&D, was recorded after the Thomas deed of trust.

Calderwood next obtained another loan from U.S. Bank secured by a deed of trust on the property. As part of this transaction, Thomas executed a subordination agreement. The Thomas subordination purported to subordinate the Thomas deed of trust to the second U.S. Bank deed of trust, which was obtained after not only the Thomas security interest, but also the M&D security interest.

When Calderwood defaulted on the six month promissory note to M&D, Blickenstaff began foreclosure proceedings and obtained a title report. For the first time, Blickenstaff learned of the Thomas deed of trust, the second U.S. Bank deed of trust and the subordination agreement. Blickenstaff also discovered that the value of the property was probably insufficient to satisfy all of the security interests. On behalf of M&D, Blickenstaff filed a complaint alleging among other things that the Thomas deed of trust as well as the U.S. Bank deed of trust were subordinate to the M&D deed of trust.

On a motion for summary judgment, the district court determined that the subordination was a partial subordination. As a partial subordination, the district court found that Thomas and U.S. Bank had essentially exchanged positions. To the extent that the U.S. Bank loan is smaller than or equal to the Thomas loan, U.S. bank would be entitled to the proceeds from the property. "If Thomas' claim was for \$100 and the second U.S. Bank loan was for \$75, the first \$100 paid from Calderwood would go \$75 to U.S. Bank, and \$25 to Thomas. M&D would be paid in full, and any remaining payment would go toward Thomas' remaining \$75 interest." *Blickenstaff*, 97 P.3d 439 at 446. The district court determined that M&D was neither harmed nor helped by the subordination agreement. M&D was not entitled to benefit from the subordination agreement in favor of U.S. Bank.

The Idaho Supreme Court refused to adopt the partial subordination theory relied upon by the district court. The Court recognized that the theory of partial subordination would leave M&D's security interest unaffected. However, the Court determined that subordination, by definition, can only reduce priorities. Subordination cannot operate to raise the position of a lower priority lien holder. Thomas could agree to subordinate his security interest to U.S. Bank, but did not have the right or ability to raise the priority of U.S. Bank above M&D. Ultimately, the Court found that U.S. Bank could not be paid until M&D's interest had been satisfied. Thomas had subordinated his interest to U.S. Bank and therefore could only be paid after M&D and U.S. Bank. Thomas' subordination was therefore a complete subordination rather than the partial subordination found by the district court.

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## NOTES

## 2. Contracts/Statute of Frauds

***Lexington Heights Dev., LLC v. Crandlemire*, \_\_\_ Idaho \_\_\_, 92 P.3d 526 (2004).**

The Crandlemires owned a 95-acre parcel of real property on West Floating Feather Road in Ada County. Lexington Heights Development, LLC executed an agreement with the Crandlemires to purchase ninety acres of the property described as “the real property situated in Ada County, Idaho located at 1400 West Floating Feather Road, consisting of approximately ninety (90) acres . . . , however excluding the residential dwelling (which will include no more than five acres) and improvements identified below (herein called ‘Premises’).” *Id.* at 528. The agreement provided that the 5-acre parcel would be determined later by survey and would include “the existing tennis court, volleyball court, and swimming pool.” *Id.*

The Crandlemires intended to split off the 5-acre parcel and sell it to a third-party. On May 4 and 5, 1999, a survey was done of the property and three legal descriptions were prepared: 1) the entire property, 2) 4.54 acres to be retained by Crandlemires, and 3) .46 acres to be conveyed to United Water Corporation. The second and third items constituted the 5-acres Crandlemires wanted excluded from sale and Mr. Crandlemire personally participated in identifying those five acres for the surveyor.

In early 2000, exploration of a possible sale of the 5-acre parcel led to a delay in the Lexington Height’s proposed development. The parties executed a second purchase and sale agreement superseding the prior agreement. The new agreement did not use or refer to the legal descriptions prepared by the surveyor. The new agreement repeated the description used in the first agreement as to how the 5-acre parcel would be determined. Closing was set for December 31, 2001. The 5-acre sale was not completed and in late 2001 Lexington Heights rejected a proposal from the Crandlemires to increase the purchase price for the ninety acres by \$200,000. The Crandlemires refused to close with Lexington Heights and sold forty acres of the property to a third party. Lexington Heights filed an action against the Crandlemires for specific performance and damages.

The district court granted summary judgment in favor of the Crandlemires dismissing Lexington Heights’ claims for specific performance as well as damages. The court found that the legal description in the agreement was insufficient to satisfy the statute of frauds and that the agreement was consequently unenforceable. The Idaho Supreme Court affirmed.

A contract for the sale of real property must contain a sufficient legal description to be enforceable under the statute of frauds. The question is not whether the parties had an oral agreement or understanding of the property to be conveyed. The question is whether the parties’ agreement has been reduced to writing. The legal description of the property is an essential term of the agreement and must be sufficient on the face of the agreement. A legal description is sufficient “so long as quantity, identity or boundaries of property can be determined from the face of the instrument, or by

reference to extrinsic evidence to which it refers.” *Id.* at 531-32 (quoting *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 244, 16 P.3d 915, 920 (2000)). The agreement in this case does not contain a sufficient legal description to identify the five-acre parcel to be excluded from the sale. Therefore, the agreement was unenforceable and Lexington Heights was not entitled to either specific performance or damages.

This case has an interesting discussion of the use of parole or extrinsic evidence to supply or supplement the legal description for an agreement. The Court discusses two different ways that evidence outside the four corners of the agreement might be available to identify the parcel of property to be conveyed. The Court rejected both arguments in this case.

It is apparent from the quoted language above that extrinsic evidence may be consulted if referred to in the agreement. This means that extrinsic evidence may be used to identify things referred to in the legal description such as natural objects, permanent monuments, places or localities. “The distinction, however, should always be clearly drawn between the admission of oral and extrinsic evidence for the purpose of identifying the land described and applying the description to the property and that of supplying and adding to a description insufficient and void on its face.” *Id.* at 533 (quoting *Allen v. Kitchen*, 16 Idaho 133, 144, 100 P. 1052, 1055 (1909)). In the present case there was nothing in the agreement that required extrinsic evidence to clarify. The legal description was simply insufficient on its face.

The Court also noted that oral or extrinsic evidence may be available where the agreement can be taken out of the operation of the statute of frauds. There are a number of exceptions to the statute of frauds. If one of those exceptions such as the doctrine of partial performance is applicable, the oral or extrinsic evidence may be allowed to prove the oral agreement. The Court’s analysis of part performance was in the context of distinguishing *Thorn Springs Ranch, Inc. v. Smith*, 137 Idaho 480, 50 P.3d 975 (2002) from the present case. The Court noted that this is not a case like *Thorn Springs Ranch* where the issue was whether their part performance would take the case out of the operation of the statute of frauds. In such a case the question is whether there was sufficient oral agreement and part performance. Here the issue is solely whether the written agreement satisfies the statute of frauds. Part performance was never raised in this case.

*A. Estoppel exception to spousal joinder rule and part performance exception to statute of frauds*

***Lovelass v. Sword*, \_\_\_ Idaho \_\_\_, 90 P.3d 330 (2004).** In 1997, the Swords executed a written purchase and sale agreement with Keith Lovelass for the purchase of a parcel of real property. The Swords gave Keith a pickup valued at \$3000 as a down payment and agreed to payments of \$200 per month toward a purchase price of \$34,500. The property was apparently in poor condition described by the Swords as a

former “drug house” containing various chemicals, hundreds of used hypodermic needles and other garbage. It was filthy and not suitable for human habitation. At great effort, the Swords cleaned the property and made it reasonably safe and habitable. The Swords also made two payments of \$200 to Keith.

The Swords couldn’t locate Keith to make the third payment. They contacted Keith’s father Gerald Lovelass and learned that Gerald and his wife Phyllis (“Mr. and Mrs. Lovelass”) owned the property rather than Keith. According to the Swords, Mr. Lovelass went to the property to discuss the situation. He agreed that \$34,500 was a fair price, but stated that the payments needed to be \$306 per month in order to cover his payment on the property. Mr. Lovelass indicated that he would discuss the situation with his wife and try to get the truck back. In a later conversation, Mr. Sword says that Mr. Lovelass indicated that he could not get the truck back, but agreed to “carry the paper” on the property until the Swords could obtain financing. The Swords believed that Mr. Lovelass had agreed to continue with the agreement they had reached with Keith Lovelass. Mrs. Lovelass was not a party to this agreement.

The Swords made monthly payments of \$306 for three years and made substantial improvements to the property. The improvements included a new roof, the addition of a water cistern and pump system, repairs to the plumbing and electrical system and an extensive cleanup of the property. In August 2000 Mr. Lovelass served the Swords with a 30-day notice to terminate their tenancy. When the Swords did not leave, the Lovelasses filed a Complaint for Eviction and Slander of Title. The Swords filed an Answer and Counterclaim seeking specific performance.

The district court applied the doctrine of part performance to take the agreement out of the statute of frauds and held that the agreement was enforceable. The court relied upon the payments combined with the improvements to the property and concluded “that the conduct of the parties is consistent with the performance of a land sale contract.” *Id.* at 333. The Idaho Supreme Court reversed relying upon Idaho Code § 32-912 because Mrs. Lovelass was not a party to the agreement and there was no evidence to support estoppel.

An agreement to convey community real property that is executed by only one spouse is void pursuant to Idaho Code § 32-912. However, there are exceptions to this general rule and “conduct from which acquiescence can be inferred may be sufficient to establish an estoppel.” *Id.* at 334 (quoting *Calvin v. Salmon River Sheep Ranch*, 104 Idaho 301, 305, 658 P.2d 972, 976 (1983)). In this case the Idaho Supreme Court found that there was no evidence that Mrs. Lovelass knew about the improvements that had been made to the property. Mrs. Lovelass knew about the payments, but testified that she believed they were rental payments. Mr. Lovelass also testified that the monthly payments were for rent. Because there was no evidence that Mrs. Lovelass knew about the improvements there was not sufficient evidence that Mrs. Lovelass acquiesced and consented to the contract for sale. There was insufficient evidence to

apply the estoppel exception to I.C. § 32-912.

### **3. Recording/Constructive Notice**

**Miller v. Simonson, \_\_\_ Idaho \_\_\_, 92 P.3d 537 (2004).** The Simonsons owned real property in Teton County. They subdivided the property and submitted CC&R's to the recorder restricting the use of the property. The CC&R's were indexed by Teton County under the name of the subdivision "Redfeather Ranch" rather than under the names of the Simonsons. Four years later, the Simonsons submitted an Amendment to the CC&R's. The amendment was again improperly indexed under the name Redfeather Ranch. The amendment was also not acknowledged properly. The Plaintiff Miller purchased a ten-acre parcel of property in Redfeather Ranch three years after the amendment and claims not to have had any actual notice of the CC&R's or the amendment even though she asked the seller about any restrictions.

Miller constructed a shed within 100 feet of the property boundary and placed metal fence posts on the property in violation of the CC&R's. When the Simonsons told Miller of the CC&R's and demanded the fence posts and shed be removed, Miller filed a declaratory judgment action. Miller argued that she had no actual or constructive notice of the CC&R's or the amendment because they were improperly recorded.

The district court granted partial summary judgment that the improperly acknowledge amendment could not have been recorded and that Miller could not have had notice of its terms. This holding was not challenged by the Simonsons on appeal. However, the district court found that Miller had record or constructive notice of the original CC&R's even though they were not indexed properly. The Idaho Supreme Court affirmed.

The Court acknowledge that Miller could not have found the CC&R's by inspecting the grantor-grantee index and that neither party to the appeal was at fault. However, the court ruled that the better rule places the risk of improper indexing on the buyer who is in a position to protect himself with title insurance. The Court held that "[t]he Idaho recording statute clearly establishes that once an instrument has been acknowledged, certified, and presented for recording it provides constructive notice to all subsequent purchasers regardless of whether the instrument is thereafter properly recorded by county officials or not." *Id.* at 541.

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## **NOTES**

#### **4. Boundary Agreements**

**Reid v. Duzet, \_\_\_ Idaho \_\_\_, 94 P.3d 694 (2004).** In 1979, Wilfred Vedder and Michael Caldero made an oral agreement to transfer a portion Vedder's property to Caldero in exchange for a well and water rights. The oddly shaped parcel of property to be transferred is referred to as the "top hat" property. The parties marked the boundaries of the top hat property with rock piles and wooden stakes. Vedder executed a written deed transferring the top hat property to Caldero. Unfortunately, legal description in the deed did not match the boundaries agreed to by the parties and marked with rock piles and stakes.

The Plaintiff Reid is Vedder's successor in interest. After Reid purchased the Vedder property, a survey revealed that a portion of the top hat property was not included in the legal description of the deed transferring the top hat property to Caldero. Reid brought this quiet title action against Caldero's successor in interest Duzet. The district court determined that Vedder and Caldero had established a boundary with landmarks visible to all parties and held that a boundary by agreement had been created. Consequently Reid was not entitled to quiet title to the property.

On appeal, the Idaho Supreme Court held that boundary by agreement was not applicable. However, the Court upheld the district court's decision not to quiet title in favor of Reid. Although the oral agreement between the parties could not be enforced, the Court found that Reid had notice that the legal description in the deed did not match the orally agreed boundaries and was therefore bound by the oral agreement.

Boundary by agreement has two well established requirements. The order in which the requirements are applied is important. There must first be an uncertain or disputed boundary involving adjacent properties. The parties must then make an agreement fixing the boundary. The dispute or uncertainty regarding the boundary must exist before and continue to exist at the time of the agreement. Absent a dispute or uncertainty, an oral agreement fixing boundaries is a conveyance of land that violates the statute of frauds.

In this case there was no dispute or uncertainty regarding the boundaries. Vedder and Caldero established the boundaries of the top hat property before any transfer was made. There was no uncertainty regarding the boundaries between Vedder and Caldero at the time they established the boundaries because the property in question all belonged to Vedder and had not yet been transferred to Caldero. Because there was no uncertainty or dispute regarding boundaries, the theory of boundary by agreement did not apply.

The Court did not find this to be an oral agreement in violation of the statute of frauds. Rather the Court held that:

when two parties orally establish boundaries of property to be transferred from one to the other, and the subsequent written deed does not match those



boundaries, the orally agreed upon boundaries will prevail. This oral agreement is binding upon all subsequent purchasers who have notice of the agreement, or who are put on notice at the time of purchase that the property as described by the inaccurate deed is claimed by someone other than the seller.

*Id.* at 699. In this case the Court determined that Reid had notice because several structures owned by Duzet were located on the top hat property and Reid could not reasonably have believed she was purchasing the structures or improvements or the land on which they were located. The Court, therefore, upheld the district court, but for a reason not relied upon by the district court.

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### NOTES

## 5. Statutes of Limitation

**Sumpter v. Holland Realty, Inc., \_\_\_ Idaho \_\_\_, 93 P.3d 680 (2004).** In March 1998 the Sumpters entered into an Exclusive Buyer Representation Agreement with Defendant Holland Realty. The Sumpters filed a complaint alleging that Holland breached duties owed to the Sumpters during that representation. The complaint was filed more than two years after the alleged cause of action arose and the district court dismissed the complaint relying upon the two year statute of limitation for professional malpractice found in Idaho Code § 5-219(4). The Idaho Supreme Court reversed. The Court determined that real estate agents do not provide professional services for purposes of I.C. § 5-219(4). The Court also found that the Sumpters causes of action sounded in tort rather than contract and therefore the four-year statute of limitation found in I.C. § 5-224 applied.

Idaho Code § 5-219(4) provides:

An action to recover damages for professional malpractice . . . must be commenced within . . . two (2) years following the occurrence, act or omission complained of . . . . The term “professional malpractice” as used herein refers to wrongful acts or omissions in the performance of professional services by any person, firm, association, entity or corporation licensed to perform such services under the law of the state of Idaho.

The term professional services is not defined in this statute. The Court referred to other code section in an effort to define professional services. The Court focused upon Idaho Code Chapter 13, Title 30 and Idaho Code Chapter 6, Title 53. These code sections respectively deal with professional service corporations and professional service limited liability companies. Both sections contain identical and exclusive lists of occupations identified as professional services. Neither section lists real estate agents. The Court found these lists to be significant, but not controlling. The Court also found similarities between the professions listed in these statutes. Taken as a whole, the lists indicate that the legislature contemplated that there would be some type of specialized higher education degree in occupations deemed to render professional services. The Court contrasted this to the requirements of a high school equivalency and a ninety-hour classroom or correspondence course for real estate agents. The Court therefore determined that it would be inconsistent with the legislative intent to apply Idaho Code § 5-219(4) to real estate agents, therefore the two-year statute of limitations does not apply.

The Court also determined that the causes of action pled by the Sumpters sounded in tort rather than contract. The Court reasoned that the Sumpters contract only contained two duties not already imposed upon Holland pursuant to the Brokerage Representation Act and that the Sumpters had not alleged a breach of either of those duties. “[I]f a cause of action for breach of a duty based on a contractual promise could also be maintained without the contract by virtue of a statutory or common law duty, then the action is founded upon tort, not contract.” *Id.* at 684. The Court determined that

the proper statute of limitation for the Sumpter's claims was the four-year statute of limitation that governs negligence action that do not involve personal injury or malpractice.

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## NOTES

## 6. Easements

**Walker v. Boozer, \_\_\_ Idaho \_\_\_, 95 P.3d 69 (2004).** Ruud Road provides access to several subdivisions. Although the road is located on a deeded easement, the grant does not specify a width. Since its creation, Ruud Road has progressed from an unimproved double track mountain road. The road has been graded, graveled and widened at various times. In the mid-nineties, the owners of Lot 49 of the Ruud Subdivision, cut approximately three feet into the bank on their property to allow access for residents of Quaker Haven Estates onto Quaker Haven Road when traveling uphill on Ruud Road. The Boozers purchased lot 49 and placed rocks and subsequently concrete barriers near the intersection between Ruud Road and Quaker Haven Road. These barriers narrowed the road and prevented reasonable access to Quaker Haven Road when traveling uphill on Ruud Road.

The Walkers and other residents of Quaker Haven Estates filed this action to establish the width of the deeded easement across the Boozer's property. Prior to purchasing their lot, the Walkers had measured the width of Ruud Road near the intersection of Ruud Road and Quaker Haven Road at twenty-two feet. Since the width of the deeded easement was not defined, the district court ruled that the easement should be determined to provide "reasonable access" to the owners within Quaker Haven Subdivision. The court fixed the width at twenty-four feet with two feet reserved for landscaping to prevent erosion. The Idaho Supreme Court affirmed holding that twenty-four feet was within the boundaries of the historical use of the easement. Since the easement was granted in general terms without limitations on use, there may be an increase in the volume and kind of use. Twenty-four feet did not enlarge the easement more than was necessary to fulfill the use of the easement.

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### NOTES

## 7. Disclosure

**White v. Mock, \_\_\_ Idaho \_\_\_, 104 P.3d 356 (2004).** White purchased a parcel of real property from the Mocks consisting of two residential units. White received a Real Property Disclosure Statement Form from the Mocks on December 7, 1998. The transaction closed on December 3, 1998. White discovered an undisclosed termite problem shortly after closing. While remodeling the rear unit in early 1999 White discovered evidence of earlier water damage and non-toxic mold in the front unit.

White filed a complaint for damages on April 26, 1999 alleging violations of the Idaho Property Disclosure Act, fraud, and violation of the Idaho Consumer Protection Act. White amended his complaint in May 2001 to add a request for rescission. On a motion for summary judgment, the district court denied the request for rescission because White did not timely comply with the Idaho Property Condition Disclosure Act and because the property had been substantially altered. The district court also determined that the Consumer Protection Act applied to White's claims. At trial, the jury determined that the Mocks did not commit fraud, that White was not damaged due to the Mock's failure to disclose a material matter on the Property Condition Disclosure form, and that although the Mocks violated the Consumer Protection Act, White had not suffered any damage from the violation.

The Idaho Supreme Court initially addressed White's claim for damages based upon stigma. White argued that he had suffered damage from the Mock's failure to disclose water damage that led to mold growth. White claimed that facts and/or speculation regarding the existence of mold created a stigma that would negatively impact a future sale. According to White, the stigma is with the Psychologically Impacted Property Statute. The district court determined that Idaho does not allow stigma damages. The Idaho Supreme Court affirmed finding the Psychologically Impacted Property Statute inapplicable.

The Idaho Supreme Court also affirmed the district court's determination that White was not entitled to rescission under the Idaho Property Disclosure Act. White did not rescind within three days as required by the Idaho Property Disclosure Act. The Court also determined that rescission was not available due to the substantial remodeling performed by White since the sale.

The Idaho Supreme Court affirmed the application of the Idaho Consumer Protection Act to individuals selling real property for investment. The Court remanded the case to the district court for a determination of damages based upon the Mock's violation of this act. The jury determined at trial that although the Consumer Protection Act had been breached, White had suffered no damage from the breach. The act provides statutory damages of at least \$1000, therefore, the Court found that a finding of no damages was in error.

## 8. Adverse Possession

***Wilson v. Gladish*, \_\_\_ Idaho \_\_\_, 103 P.3d 474 (2004).** In *Wilson v. Gladish*, the Idaho Supreme Court affirmed a district court decision applying the doctrine of adverse possession. The district court applied the lot number exception to satisfy the requirement that the adverse possessor pay property taxes on the property possessed. The Idaho Supreme Court found another exception to the property tax requirement to be more applicable. The Court relied upon what it called the *White/Flynn* exception and ruled that “an adverse possessor who occupies that same quantity of land as that to which he holds title, and who pays taxes on that amount of land, will be deemed to have paid taxes on that land.” *Id.* at 479.

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### NOTES

## 9. *Employment/Commission Agreements*

***Bakker v. Thunder Spring –Wareham, LLC***, \_\_\_ Idaho \_\_\_, 108 P.3d 332 (2005). In a dispute over the payment of a commission for marketing condominiums, the Idaho Supreme Court affirmed a district court decision that no commission was due. Bakker’s employment contract provided “You will also be paid .25% of 1% override on all successful closing of escrow on units at Thunder Spring” *Id.* The contract contained limitations on the payment of this commission including that “this is in affect (sic) only during the term of employment with . . . Thunder Spring.” *Id.* There was a dispute over a commission for a closing that occurred after the termination of Bakker’s employment. In ruling for the employer, the Idaho Supreme Court stated:

The original rule governing the earning of commissions was that a broker earned a commission when he procured a buyer “ready, willing and able” to purchase property according to the seller’s terms. However . . . This Court modified that rule to require the purchaser to close the transaction according to the contract, noting that a growing number of courts had adopted the rationale of [*Ellsworth Dobbs*]. This Court’s express language was: “We also adopt the three-part test set out in *Ellsworth Dobbs* as the general rule to determine when a real estate broker earns his commission.” . . . We conclude that exceptions to this general rule will be found in the terms of the employment negotiated between the employer and employee. As long as the employer is meeting the minimum wage requirements of state law, further compensation is subject to negotiations between the employer and employee.

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### NOTES

### 10. *Economic Loss Rule*

In ***Blaht v. Smith***, \_\_\_ Idaho \_\_\_, Docket No. 29709 (Sup. Ct., March 4, 2005), the Idaho Supreme Court affirmed the dismissal of a damages claim against a developer based upon the economic loss rule. The developer performed grading, road construction, landscaping, and installation of sewer and other utilities for a subdivision in which a home purchased by Plaintiff was eventually built. Plaintiff's home was damaged due to settlement and they brought this suit against the developer and others involved with the construction of the home. The Court applied the economic loss rule holding that Plaintiff's could not recover purely economic damages against the developer on a negligence claim. See also ***Nelson v. Anderson Lumber***.

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### NOTES

To receive credit for this course by distance learning methods (video, audio, etc.) you MUST pass the challenge exam for this course on or before June 30, 2006. If you fail the exam, you may retake it once. If you fail the retake exam, you will be required to provide proof of attending a live classroom presentation. This course, exam and retake exams will not be offered after June 30, 2006.



## INSTRUCTOR & COURSE EVALUATION

(Please use a separate form for **each** instructor involved in teaching this course)

We appreciate your time and candor in completing this evaluation. Your comments will help us to improve the quality of future offerings. Use five as the high rank and one as the low. Thank you.

INSTRUCTOR: \_\_\_\_\_ SCHOOL: \_\_\_\_\_  
COURSE: \_\_\_\_\_ DATE: \_\_\_\_\_

*Circle the number of your answer to each question.*

### About the INSTRUCTOR:

Presentation/speaking ability (used varied techniques to keep your attention):	5	4	3	2	1
Competence (demonstrates in-depth knowledge of subject, prepared):	5	4	3	2	1
Application of knowledge (understandable, encouraged participation):	5	4	3	2	1
Student rapport (made you feel comfortable and at ease, respectful):	5	4	3	2	1

How can the instructor be more effective? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

### About the COURSE:

Course materials (organized, useful):	5	4	3	2	1
Learning environment conducive to learning (clean, room to write):	5	4	3	2	1
How well did the course meet your expectations?	5	4	3	2	1
Was the textbook utilized effectively during class time?	Yes				No
Will the course material help you to do a better job in your real estate career?	Yes				No

We appreciate your COMMENTS: \_\_\_\_\_

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